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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 728

MAY DEPARTMENT STORES COMPANY, a New York Corporation, and JERRY GODDARD, *Petitioners*,

v.

TAKASHI KATAOKA, by his Guardian *ad Litem*, TSUTOMU KATAOKA, and TSUTOMU KATAOKA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALTER O. SCHELL,
GERALD F. H. DELAMER,
JOSEPH H. WHEELER,
1212 Bartlett Building,
Los Angeles, California,
Counsel for Petitioners.

FRANK J. HOGAN,
EDMUND L. JONES,
810 Colorado Building,
Washington, D. C.,
Of Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

MAY DEPARTMENT STORES COMPANY, a New York Corporation, and JERRY GODDARD, *Petitioners,*

v.

TAKASHI KATAOKA, by his Guardian *ad Litem*, TSUTOMU KATAOKA, and TSUTOMU KATAOKA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Your petitioners, MAY DEPARTMENT STORES COMPANY, a New York corporation, and JERRY GODDARD (sued herein as Jerry Goddord), respectfully file and submit this as their Petition for a Writ of Certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

Said Circuit Court of Appeals on November 18, 1940, reversed a decision and judgment of the District Court of the United States for the Southern District of California, Central Division, in favor of petitioners and against respondents herein, for lack of jurisdiction on the part of the said District Court to entertain the action. (R. 178) The decision is reported in 115 Fed. (2d) 521. Mandate has been stayed by proper order (R. 179) and the cause is now filed and docketed herein for decision. The decisions of the District Court in this case are reported in 28 Supp. 3, and 30 F. Supp. 346.

SUMMARY STATEMENT OF MATTER INVOLVED.

This is an action for damages arising out of alleged injuries to Takashi Kataoka, an infant, as a result of his catching his hand in an escalator in the store of the May Company in Los Angeles, California. Suit was instituted in the District Court of the United States for the Southern District of California, Central Division.

The complaint contains three separate and distinct alleged causes of action.

The first of these causes of action (R. 1 to 6) alleges that the minor plaintiff therein was a resident and citizen of the State of California; that the defendant May Department Stores Company (hereinafter referred to as "May Company") was a resident and citizen of the State of New York; that the defendant Jerry Goddord was an employee of that defendant, acting within the scope and course of his employment, and that the amount in controversy, exclusive of costs and interests, is over the sum of three thousand dollars. (R. 2 to 3)

There is *no* allegation as to the residence or citizenship of the defendant Goddard.

It is alleged that the May Company maintained, managed and operated a department store building, furniture, fixtures and equipment. (R. 3)

It is *not* alleged that the defendant Goddard maintained or managed or operated or had any control whatsoever over the store building, furniture, fixtures or equipment.

It is also alleged that the minor plaintiff and his mother were customers and invitees of the defendant May Company. (R. 3)

It is *not* alleged that the plaintiff or his mother were customers or invitees of the defendant Goddard.

It is then alleged that amongst the fixtures and equipment installed in the building managed and operated *by the defendant May Company* was an escalator. (R. 3)

It is *not* alleged that this escalator was managed or operated or in any wise under the control of the defendant Goddard or that he had anything to do with the escalator.

It is then alleged that where the escalator merges into the floor of the building there is a narrow metal plate which runs the whole width of the step, and that protruding from said metal plate are metal fingers about two inches apart and each about one inch long, so that there is a small opening or aperture about a quarter of an inch deep between the plate and the steps and running the whole length of the step. It is alleged that this aperture was not covered but was left open. (R. 4)

It is then alleged that the minor plaintiff in some way got his hand caught in the escalator while his mother was talking with the defendant Goddard concerning an exchange of a previous purchase. (R. 4)

It is then alleged that the defendant Goddard attempted to remove the minor plaintiff's hand, stopped the escalator and finally reversed it, without summoning anyone having knowledge of the mechanics of the escalator. (R. 5)

It is *not* alleged that any of said acts upon the part of Goddard were in any wise improper or negligent.

It is then alleged that the step of the escalator, in coming back, severed the third and fourth fingers of the hand of the minor plaintiff. (R. 5)

It is then specifically alleged "that the loss of the fingers was proximately caused by the negligence and carelessness of the defendants, and each of them, in failing to cover the said aperture or opening, and by allowing it to remain unguarded"; that the defendants and each of them knew or should have known that children would visit the store, ride on the escalator, and that the escalator, and particularly the opening between the steps and the floor, was alluring to them and would be likely to attract them and induce them to put their hands therein. (R. 5-6)

Finally, it is alleged "that by reason of the negligence and carelessness of the defendants, and each of them, *as aforesaid,* and as a proximate consequence thereof," the plaintiff suffered certain damages. (Italics ours.) (R. 6)

There is *no* allegation of any duty upon the part of the defendant Goddard to cover the said aperture or opening or to prevent it remaining unguarded. There is *no* allegation that he had any right or authority to have done so.

This first cause of action does not refer to or attempt to incorporate any portion of the remaining causes of action. There is a separate prayer for damages in the sum of fifteen thousand dollars upon this cause of action. (R. 8)

Then follows a "separate, distinct and second cause of action." (R. 6-7) This cause of action incorporates all of the allegations of the first cause of action down to but not including the allegations of negligence and proximate cause.

In this second cause of action the injuries to the minor plaintiff are alleged to have been caused by negligence in operating, conducting and supervising the escalator and by negligence upon the part of the defendant Goddard in attempting to remove the hand of the minor plaintiff and in his failure to summon an expert to release that plaintiff's hand. (R. 6-7)

There is, however, still no allegation that the defendant Goddard had any participation in or control of the operation, conducting or supervising of the escalator.

There is a separate prayer for damages in the sum of fifteen thousand dollars on this cause of action. (R. 8)

Then follows a third "separate and distinct cause of action." (R. 7-9) This cause of action incorporates the allegations of the first two causes of action and then alleges damages to the plaintiff father for medical, hospital and nursing services. There is a separate prayer for damages on this cause of action in the sum of $992.18. (R. 8)

The answer of the defendants admitted by failure to deny the residence and citizenship of the minor plaintiff and of the defendant May Company; that the amount in controversy, exclusive of costs and interest, is over the sum of three thousand dollars. The answer also admitted by failure to deny that the defendant May Company maintained the store in Los Angeles and its furniture, fixtures and equipment, including the escalator, and that the defendant Jerry Goddard was its employee and acting within the scope and course of his employment. (R. 9 to 13)

The answer admitted the operation of the escalator by the defendant May Company, and that the hand of the minor plaintiff got caught therein betwen the step and the metal plate. It denied negligence upon the part of the defendants, or either of them, or that any negligence upon their part caused injury or damages to the plaintiffs. (R. 10-11)

The answer denied the allegations as to the acts of the defendant Goddard, except that it admitted that he attempted to remove the plaintiff's hand and slightly reversed the escalator to enable him to do so. (R. 11)

The case went to trial before a jury. Plaintiffs introduced no evidence as to how the accident occurred nor as to the construction, operation, maintenance or supervision of the escalator, nor that the defendant Goddard did not have a knowledge of the mechanics of the escalator, nor that his conduct was in any wise negligent or improper. (R. 47 to 87)

Upon the conclusion of the plaintiff's case, the defendants, severally, moved to dismiss the action on the ground that the evidence failed to show any negligence on the part of the defendants, or either of them or that any negligence on the part of the defendants, or either of them, proximately or at all contributed to the happening of the accident. These motions were granted. (R. 87) Thereafter judgment was entered for the defendants. (R. 18)

Plaintiffs served a notice of intention to move for new trial. (R. 34, 38) While said motion was pending, plaintiffs filed a notice of motion to dismiss for lack of jurisdiction. (R. 40) The latter motion was denied (R. 37) and thereafter the motion for new trial was also denied. (R. 39)

Plaintiffs thereupon filed a notice of appeal from the judgment in said action, without specifying therein whether the appeal was from the whole of said judgment or from a specified part thereof. (R. 41)

In their Opening Brief in this appeal, appellants stated that they "have not assigned as error the action of the District Court in denying the motion (for judgment on the ground of no jurisdiction) as appellants * * * believe the ends of justice would be served if this case be decided by this court on the merits". In neither their Opening Brief nor in their Reply Brief nor upon oral argument before the Circuit Court of Appeals did appellants advance any argument, reason or authority why the judgment *in favor of the defendant Goddard* should not be affirmed if the District Court had jurisdiction of the case. (R. 95 to 152; see especially R. 142)

QUESTIONS PRESENTED.

Where a complaint is filed in the Federal Court and contains a separable controversy between a resident plaintiff and non-resident defendant, has the Federal Court jurisdiction of that controversy?

Especially does it not have such jurisdiction where said separable controversy is set forth in a separate and distinct cause of action, not referring to or adopting any allegations of any other cause of action and not containing any allegation of any duty upon the part of the resident defendant nor of the violation of any such duty nor of any other negligence upon the part of said resident defendant?

Is the Federal Court deprived of jurisdiction as to such separable controversy by the addition to the complaint of a separate cause of action between residents of the same state?

Is the jurisdiction of a District Court as to all causes of action as extensive where the complaint is originaly filed in that Court as it would have been had the same complaint been filed in the State Court and then removed to the District Court?

Upon the dismissal of a case as to the only resident defendant, has the Federal Court jurisdiction to render judgment between the resident plaintiff and the non-resident defendant?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction of said first cause of action is in conflict with the decisions of the Circuit Courts of Appeal of other jurisdictions, to wit:

> *Nichols* v. *Chesapeake, etc. Ry. Co.* (C. C. A. 6), 195 Fed. 913; *Jacobson* v. *Chicago, etc. Ry Co.* (C. C. A. 8), 66 Fed. (2d) 688; *Jackson* v. *Chicago, etc. Ry. Co.* (C. C. A. 8), 178 Fed. 432; *Young* v. *Southern Pacific Co.* (C. C. A. 2), 15 Fed. (2d) 280; *Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28; (Reversed on other grounds, 284 U. S. 183; 76 L. E. 233).

2. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction of the sec-

ond cause of action in plaintiffs' complaint is in conflict with the above decisions of other Circuit Courts of Appeal.

3. In holding that the District Court did not have jurisdiction of either said first or second causes of action, the Circuit Court of Appeals has decided a Federal question probably in conflict with the applicable decisions of this Court, namely:

> *Barney* v. *Latham*, 103 U. S. 205; 26 L. E. 514 (Involving an accounting, title to personal property and conveyance of real property); *Geer* v. *Mathieson*, 190 U. S. 428, 47 L. E. 1122 (Rescission for fraud); *Connell* v. *Smiley*, 156 U. S. 335; 39 L. E. 443 (Quiet title); *Pullman Co.* v. *Jenkins*, 305 U. S. 534; 83 L. E. 334 (Tort action); *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176; 51 L. E. 430; *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 93; 66 L. E. 144.

4. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction of the entire action is in conflict with the decisions of other Circuit Courts of Appeal, namely:

> *Jacobson* v. *Chicago, etc. Ry. Co.* (C. C. A. 8), 66 Fed. (2d) 688, *supra; Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28; (Reversed on other grounds, 284 U. S. 183; 76 L. E. 233); *supra.*

5. In holding that the District Court did not have jurisdiction of the entire action, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

> *Barney* v. *Latham*, 103 U. S. 205; 26 L. E. 514, *supra; Geer* v. *Mathieson*, 190 U. S. 428; 47 L. E. 1122, *supra; Connell* v. *Smiley*, 156 U. S. 335; 39 L. E. 443, *supra.*

6. In holding that the joinder of a resident defendant in the action deprived the District Court of jurisdiction to determine a controversy to which that resident defendant was not an indispensable party, the Circuit Court of Appeals has

decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Boon's Heirs v. *Chiles*, 8 Pet. (U. S.) 532; 8 L. E. 1034 (Suit to compel conveyance of property); *Cameron* v. *McRoberts*, 3 Wheat. (U. S.) 591; 4 L. E. 467 (Suit in equity).

7. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction to render a judgment between the resident plaintiff and the nonresident defendant after the dismissal of the case as to the resident defendant is in conflict with the prior decision of the same Circuit, which decision has been necessarily affirmed, though without specific mention thereof, by this Court in the case of *Western Union Telegraph Co.* v. *Nester*, 106 Fed. (2d) 587; same case in this Court, 309 U. S. 582; 84 L. E. 960.

8. In so holding, the present decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal, namely:

Jennings v. U. S. (C. C. A. 8), 264 Fed. 399; *Jackson* v. *Jackson* (C. C. A. 4), 175 Fed. 710; *Silver King* v. *Silver King* (C. C. A. 8), 204 Fed. 166; *Drumright* v. *Texas*, etc. (C. C. A. 5), 16 Fed. (2d) 657.

9. In so holding, the Circuit Court of Appeals has decided in this case a question involving Federal law in a way probably in conflict with applicable decisions of this Court, namely:

Connolly v. *Taylor*, 2 Pet. 556; 7. L. E. 518; *Vattier* v. *Hinde*, 7 Pet. 252; 8 L. E. 675.

10. The Circuit Court of Appeals has decided an important question of Federal law in conflict with decisions of this Court in that it has, in effect, held that in a tort action instituted in a District Court the joinder of other causes of action therewith deprives that District Court of jurisdiction even over a separable controversy therein be-

tween a resident plaintiff and a non-resident defendant, to which controversy the resident defendant is not even a proper party, much less an indispensable party.

Your petitioners present herewith as part of this Petition a Brief setting forth more fully their views upon the questions involved, and also a Transcript of the record of the Circuit Court of Appeals.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete Transcript of the record and all proceedings in said Circuit Court of Appeals in said case therein entitled "Takashi Kataoka, by His Guardian ad Litem Tsutomu Kataoka, and Tsutomu Kataoka, Appellants, vs. The May Department Stores Company, a New York Corporation, and Jerry Goddord, Appellees", No. 9479 in said Court, to the end that said case may be reviewed and determined by this Court, and that the said judgment of the Circuit Court of Appeals in said case may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

MAY DEPARTMENT STORES COMPANY,
a New York corporation,

JERRY GODDARD,
Petitioners.

By

WALTER O. SCHELL,
GERALD F. H. DELAMER,
JOSEPH H. WHEELER,
Counsel.

FRANK J. HOGAN,
EDMUND L. JONES,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(1) THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 115 Fed. (2d) 521. (See R. 173)

The opinion of the United States District Court is reported in 28 F. Supp. 3.

The opinion on denial of the motions to dismiss is reported in 30 F. Supp. 346.

(2) JURISDICTION.

The decision of Circuit Court of Appeals was entered November 18, 1940. (R. 179)

The jurisdiction of this Court is invoked under Section 240(a), as amended, of the Judicial Code (28 U. S. C. A. Par. 347). The petition is filed in accordance with Rule 38 of this Court.

(3) STATEMENT OF THE CASE.

A summary of the case will be found under the heading "Summary Statement of the Matter Involved" in the Petition for Writ of Certiorari to which this brief is annexed. In the interest of brevity the statement will not be repeated.

(4) SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction of the first cause of action in plaintiffs' complaint because:

(a) The allegations of said first cause of action fail to state facts sufficient to state a cause of action against the resident defendant, Jerry Goddard.

(b) The allegations of said first cause of action established the existence of a separable controversy between the resident minor plaintiff and the non-resident defendant,

May Company, namely, a controversy as to the maintenance by that defendant of an escalator attractive to children, to which controversy the resident defendant, Goddard, was not a proper party and in which controversy he was in no wise interested.

2. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction of the second cause of action in plaintiffs' complaint because:

The allegations of said second alleged cause of action established the existence of a separable controversy between the resident minor plaintiff and the non-resident defendant, May Company, in that these allegations established a controversy between said parties as to negligence upon the part of said defendant in the maintenance, operation, supervision and control of the escalator, to which controversy the resident defendant, Goddard, was not a proper party and in which controversy he was in no wise interested.

3. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction of the entire case, since

(a) The first cause of action therein constituted a separable controversy between the resident minor plaintiff and the non-resident defendant, May Company.

(b) The second cause of action therein contained a separable controversy between the resident minor plaintiff and the non-resident defendant, May Company.

4. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction to render a judgment between the resident minor plaintiff and the non-resident defendant, May Company, in the controversies between them to which the resident defendant, Goddard, was not an indispensable party.

5. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction to render a judg-

ment between the resident minor plaintiff and the non-resident defendant, May Company, upon the dismissal of the case as to the resident defendant, Goddard.

(5) ARGUMENT.

POINT I.

The First Cause of Action Failed to State Facts Sufficient to Constitute a Cause of Action Against the Resident Defendant, Goddard.

The first cause of action is based on the alleged maintenance *by the defendant May Company* of an instrumentality attractive to children. (R. 5)

It was the theory of plaintiffs that it was the action of the escalator when reversed that severed the plaintiff's fingers rather than the catching of his hand during the forward motion of the escalator. (R. 128) Consequently, it was necessary for the plaintiff to connect the injury so sustained with the alleged negligence in the maintenance of the escalator. To do this plaintiffs were required to allege how the escalator came to be reversed so that they could claim that the injury followed as a natural and unbroken sequence from the alleged negligence in its maintenance. That this was the only purpose in including the allegation as to the conduct of the defendant Goddard in stopping and reversing the escalator is shown by the facts that (1) the cause of action contained no allegation of negligence with respect to these facts, and (2) on the contrary, the injury is specifically alleged to have been due to negligence in failing to cover the aperture between the stationary comb-plate and the moving steps.

The maximum, therefore, that can be said of the allegations of this cause of action as charging the defendant Goddard with negligence is that inferentially they might charge him with "nonfeasance" in failing to cause the aperture to be covered or guarded, with no allegation of any duty upon his part to have done so. It is the universally recog-

nized rule of law that mere nonfeasance upon the part of an employee in connection with safeguarding the instrumentalities of his employer is not sufficient to give rise to a cause of action against that employee in favor of one injured by such instrumentality.

In *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176, 51 L. Ed. 430, the complaint alleged that the defendant non-resident corporation employed the plaintiff in certain work in connection with the melting of grease and lubricant matter which was delivered by the corporation to the plaintiff in large barrels, and that it was plaintiff's duty in the course of his employment to hoist the same to the surface of the furnace structure into which the pots were set, and then to dump the grease and lubricant matter into the pots. The negligence charged against the corporation consisted in allowing the pots to remain open and exposed without covering, railing, device or any means to protect the plaintiff from accidentally slipping or falling into the same while engaged in the performance of his duties. The negligence charged against the resident defendants was that they were employed by the corporation, and charged by it with superintending and oversight of the plaintiff in the performance of his duties, that they were employed and charged by the corporation with the duty of superintending and properly planning the construction of the furnace, and with the duty of providing reasonably safe pots with suitable covering, railing and other devices, and with the duty of instructing the plaintiff as to the manner of performing his duties. Negligence was also alleged as to the non-resident corporation in providing unsafe working conditions and as to the resident defendants in the planning and directing of the construction thereof and in the giving of instructions as to the maner of performing plaintiff's duties. It was held that the case was properly removed to the federal court.

Wilson v. *Republic Iron & Steel Co.*, 257 U. S. 92, 66 L. Ed. 144, was an action by an employee against his employer

and a co-employee to recover for injuries sustained by the plaintiff by reason, as was alleged, of his conforming to an order or direction negligently given to him by a co-employee and to which he was bound to conform. The defendant nonresident employer filed a petition for removal. The petition for removal was granted and a motion to remand later denied. The Supreme Court on writ of error held that the District Court rightfully sustained its jurisdiction of the cause.

In *Clancy* v. *Brown* (C. C. A. 8), 71 Fed. (2d) 110, the complaint alleged that the nonresident defendant corporation was engaged in operating a hotel; that the resident defendant employee was the housekeeper and superintendent of the corporation in charge of hotel and was a vice-principal with power to employ and discharge employees, and that the plaintiff worked under her, subject to her orders and directions; that while the plaintiff was so employed, she was ordered by the resident employee defendant to go to a roof gathering with other employees; that the only available path to the roof was a stairway which was lighted and which was under the control and supervision of the defendants and was maintained by them, and that while plaintiff was returning from the roof, through the joint and concurring negligence of the defendants in failing to properly light and maintain said stairway, she fell and was severely injured. The court held that the complaint did not establish a cause of action against the resident employee defendant and that the federal courts, therefore, had jurisdiction.

In *Knight* v. *Atlantic Coast Line* (C. C. A. 5), 73 Fed. (2d) 76, the complaint alleged that the resident section foreman engaged in clearing the nonresident railroad's right-of-way of ignitible material allowed a large quantity of ignitible material to remain and breached a duty to the public to keep the right-of-way reasonably free from such substances; that a fire was caused by sparks from a locomotive, which spread to the land of the plaintiff. The court held

that the complaint failed to state any cause of action against the resident foreman, and affirmed the jurisdiction of the District Court to hear the case. In so holding, the court says (p. 77):

> "As to the public generally, and as to the appellant as one of the public, it was not made to appear by allegations of fact that Poppel was under any duty with reference to the condition of the part of the right of way where the fire started. The allegations of the petition do not show that Poppell incurred any liability to the appellant by failing or omitting to do anything with reference to easily ignitible material on the part of the right of way where the fire started, or in any other way. It follows that the petition failed to allege any cause of action against Poppell, and that the court did not err in denying the motion to remand."

Likewise, in the present case, plaintiffs' complaint failed to show that the defendant Goddard had any duty whatsoever with respect to the escalator, either to his employer or to the public generally. The complaint in the case at bar did not even contain the general allegation that he owed a duty to the plaintiffs, either as members of the public or otherwise. Again, in the cited case, it appears that the resident employee could have removed the danger, whereas in the case at bar there is neither allegation nor proof to that effect.

In *Winfield* v. *Wichita Natural Gas Co.* (C. C. A. 8) 267 Fed. 47, it is said at page 52:

> "It is the controversies the facts pleaded in the complaint portray, not the legal conclusions the pleader alleges result from those facts, nor his averments of joint action, nor his prayer for relief, that determine whether or not the controversies disclosed by the complaint are separable. The material facts pleaded in this complaint have been thoughtfully considered in view of this rule of pleading, and the conclusion is irresistible that the controversies between these parties which they disclose are separable."

See also:

Jackson v. *Chicago etc. Ry.* (C. C. A. 8), 178 Fed. 432, 434; *Epperson* v. *Midwest Refining Co.* (C. C. A. 8), 22 Fed. (2d) 622.

In *Macutis* v. *Cudahy Packing Co.* (D. C. Neb.), 203 Fed. 291, the complaint was against a non-resident corporation and its resident foreman for personal injuries, alleging the failure of the foreman to maintain the place where plaintiff was required to work and the appliances in a reasonably safe condition. It was held that the complaint did not state a cause of action against the foreman personally, and that the case was removable to the federal court. The case was subsequently cited with approval by the Fifth Circuit in the *Knight* case, *supra.*

In Floyt v. *Shenango Furnace Co.* (C. C. Minn.), 186 Fed. 539, the complaint alleged negligence of a superintendent in failing to see that a ladderway in a mine was in a reasonably safe condition. It was again held that mere nonperformance on the part of the superintendent did not constitute a cause of action against him, and that the case was removable by his employer nonresident corporation. This case was cited with approval in the Fifth and Eighth Circuits, in the *Clancy* and *Epperson* cases, *supra.*

In addition, we would call the attention of this Court to numerous similar decisions of various Federal Courts, the cumulative effect of which is highly persuasive.

Franklin v. *May Department Stores Co.*, 25 Fed. Supp. 735; *Hane* v. *Mid-Continental etc. Co.*, 47 Fed. (2d) 244; *Shaver* v. *Pac. Coast etc. Co.*, 185 Fed. 316; *Marach* v. *Columbia Box Co.*, 179 Fed. 412; *Plunkett v. Gulf Refining Co.*, 259 Fed. 968; *Johnson* v. *Coast Mfg. etc. Co.*, 53 Fed. (2d) 271; *Morefield* v. *Ozark Pipe etc. Co.*, 27 Fed. (2d) 890; *Forrest* v. *Southern Ry. Co.*, 20 Fed. Supp. 753; *Davis* v. *St. Louis etc. Ry Co.*, 8 Fed. Supp. 519; *Puckett* v. *Columbus Power Co.*, 248 Fed. 353; *Richardson* v. *Southern Idaho etc. Co.*, 209 Fed. 949; *McAllister* v. *Chesapeake & Ohio Ry.*, 198 Fed. 660; *Cayce* v. *Southern Ry. Co.*, 195 Fed. 786; *Bain-*

bridge Co. v. *Atlantic etc. Line*, 182 Fed. 276; *Evansburg* v. *Insurance etc. Co.*, 168 Fed. 1001; *Adderson* v. *Southern Ry. Co.*, 177 Fed. 571; *McIntyre* v. *Southern Ry. Co.*, 131 Fed. 985; *Ferguson* v. *Chicago etc. Ry.*, 63 Fed. 177.

POINT II.

The First Cause of Action Sets Forth a Separable Controversy Between the Resident Plaintiff and the Non-Resident Defendant, May Company.

It follows from the foregoing that the first cause of action necessarily sets forth a separable controversy between the minor plaintiff and the defendant May Company, to which the defendant Goddard is not even a proper party.

Moreover, from its very nature a cause of action based upon the theory of the maintenance of an attractive instrumentality can only be against a defendant which is alleged to have maintained that instrumentality.

The Court will also remember that this is not a case wherein the plaintiffs, having a right so do, elected to frame their complaint so as to bring it within the exclusive jurisdiction of the State courts. On the contrary, the plaintiffs elected to set forth in their first cause of action a separable controversy between them and the non-resident corporation defendant, carefully alleging in that cause of action all of the necessary facts to confer jurisdiction upon the District Court, and carefully refraining from any allegation not necessary to establish such jurisdiction. Thus, there is no allegation whatsoever as to the residence or citizenship of the plaintiff father (whose only interest as a plaintiff is in the third cause of action) or of the defendant Goddard. None of the allegations of the remaining causes of action are referred to or incorporated in the first cause of action.

It seems obvious that in framing the complaint the plaintiffs did not regard the first cause of action as being against anyone except the defendant May Company and that they did regard it as being a separate and distinct cause of ac-

tion against that defendant which they were entitled to bring and maintain in the District Court.

The allegations of the first cause of action cannot be considered as enlarged by any allegations contained in the remaining causes of action, since these latter are not incorporated or even referred to in that first cause of action. This is true both under the Federal Rules of Civil Procedure (Rule 10(b) and 10(c)) and also under the Conformity Act (R. S. 914, 28 U. S. C. A. 724), in so far as this statute is still in effect as not inconsistent with said Federal Rules. *Hopkins* v. *Contra Costa*, 106 Cal. 566, 570; 39 Pac. 933; *Little* v. *Union Oil Co.*, 73 Cal. App. 612, 617-618; 238 Pac. 1066.

POINT III.

The Second Cause of Action Sets Forth a Separable Controversy Between the Resident Plaintiff and the Non-Resident Defendant, May Company.

The second cause of action, in so far as the allegations of fact are concerned, is but a repetition of the first cause of action. It differs from the first cause of action solely in the allegations as to the proximate cause of the injury to the minor plaintiff.

Whether or not negligence upon the part of the defendant Goddard is to be deemed sufficiently alleged in this second cause of action, upon the same principles discussed with reference to the first cause of action a separable controversy is set up in that second cause of action between the resident minor plaintiff and the non-resident defendant, May Company, arising out of the alleged negligent maintenance by the latter of an instrumentality attractive to children, to which controversy the defendant Goddard still is not even a proper party.

In connection with both the first and second causes of action it is especially significant that no attempt whatsoever was made to establish on the trial of the case that any of the acts of the defendant Goddard were negligent. No

evidence whatsoever addressed to that point was introduced. No attempt was made to show that that defendant did not have a knowledge of the mechanics of the escalator or a sufficient knowledge thereof to justify him acting in the emergency. No attempt was made to establish that it was unwise or improper to have stopped the escalator or to have reversed its action. No attempt was made to show that any other course of action would have been wiser or would have resulted in less injury to the minor plaintiff. No attempt was made to show that the severance of the fingers of the plaintiff's hand was in fact caused by the reversing of the escalator. On the other hand, the testimony of plaintiff's physician, Dr. Alfred E. Gallant, indicates that the damage to the plaintiff's hand must have been done before the reversal of the escalator. (R. 76)

We submit that the utter failure even to attempt to establish on trial a right of recovery against the defendant Goddard is highly persuasive that not only was the controversy between the minor plaintiff and the non-resident defendant, May Company, separable from any controversy between that plaintiff and the defendant Goddard, but that, in fact, no controversy whatsoever did exist between that plaintiff and that resident defendant.

Likewise, we submit that this utter failure even to attempt to establish on trial a right of recovery against the defendant Goddard establishes an abandonment of any cause of action against the defendant Goddard, leaving the case solely between the resident minor plaintiff and the non-resident defendant, May Company.

Finally, in this connection we would call this court's attention to the fact that upon the appeal to the Circuit Court of Appeals, in their briefs or on oral argument, appellants failed to advance any reason, argument or authority in any wise tending to show error upon the merits upon the part of the trial court in dismissing the case as to that resident defendant, Goddard. (R. 95 to 152; especially Tr. p. 142.)

We submit that both the pleadings, the conduct of the

case upon trial, and the presentation of the case upon appeal, all conclusively show that separable controversies between the resident plaintiff and the non-resident defendant, May Company, were set forth, and were intended to be set forth, in both the first and second causes of action in plaintiffs' complaint.

POINT IV.

Authorities Showing That a Separable Controversy Exists and the District Court has Jurisdiction.

It is thoroughly settled that where a separable controversy exists between a resident plaintiff and a non-resident defendant the District Court has jurisdiction thereof and the case may be removed from the State courts to such District Court.

In *Nichols* v. *Chesapeake & Ohio Ry. Co.* (C. C. A. 6), 195 Fed. 913, the original complaint alleged negligence of one Cook as the engineer of the defendant's railroad trains and alleged the company's negligence by reason of the doctrine of *respondeat superior*. Subsequently, the complaint was amended by adding thereto an additional cause of action based upon the Federal Safety Appliance Act. *After the amendment*, the defendant filed a petition for removal on the ground of separable controversy. The Circuit Court of Appeals held that this additional cause of action constituted a separable controversy between the plaintiff and the defendant railway company, and hence that the case was removable, the court saying, page 915:

> "By the amended petition of July 1905, it appeared that a controversy existed whether the Railway Company was liable to Nichols by reason of the existence and effect of the Safety Appliance Act. This was a controversy with which Cook was not concerned. It was not alleged that he was liable, or that the Railroad Company, through him, was liable upon this subject-matter."

Likewise, in the case at bar, it appears that a controversy existed whether the May Company was liable by reason of the maintenance of an instrumentality alleged to be attractive to children. This was a controversy with which the defendant Goddard was not concerned. It was not, nor could it be, alleged that he was liable or that the May Company, through him, was liable upon this subject-matter.

Continuing, the court, in the *Nichols* case, says:

> "At the same time the petition alleged a joint liability against the Company and Cook, resulting from Cook's common-law negligence as engineer in the management of the train. It has been distinctly held by the Supreme Court (Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983) that the liability under a statute for failing to observe its provisions and the liability under the common-law rules of negligence may give rise to causes of action so separate that one may be barred by statute where the other would not be. It seems necessarily to follow that, where there are separate or distinct causes of action, there must be separable controversies. Each cause of action must present a controversy. Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal presupposes that it may be found joined in one action with another controversy. In the present case, even if the cause of action is not 'separate,' yet the 'separable' character of the claim under the statute is made clear by the fact that one of the defendants has no concern with this question. We are satisfied that the second removal petition conferred jurisdiction on the federal court (Jackson v. C., R. I. & P. Ry. Co., 178 Fed. 432, 102 C. C. A. 159), and that the action which had been commenced in March and was then pending in the state court upon the amended July petition was, for the first time, effectively removed."

In *Pullman Co.* v. *Jenkins*, 305 U. S. 534, 83 L. E. 334, the complaint alleged that the decedent was employed by the Southern Pacific Company as a conductor of a train;

that his death resulted from injuries due to a blow struck him by one Kash, who was being removed from the train by police officers called to assist the Pullman conductor in ejecting Kash because of Kash's disorderly conduct. Negligence was charged against the Southern Pacific Company and its gatetender in permitting Kash, while intoxicated, to go through the gates leading to the train. The negligence charged against the Pullman Company and its porter consisted in permitting Kash to board the Pullman sleepers.

The court held that the cause was not removable to the District Court *by the defendant Pullman Company* because of that joint negligence alleged against it and its porter, but the court also recognized that the complaint did state separable controversies between the plaintiffs and the defendant Kash (83 L. E. pp. 338-339), and between the plaintiffs and the Southern Pacific Company (83 L. E. p. 339). Moreover, citing the *Nichols* case, *supra*, the court said (83 L. E. p. 338):

> "If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants does not preclude removal. Barney v. Latham, 103 U. S. 205, 26 L. ed. 514, supra; Nichols v. Chesapeake & O. R. Co. (C. C. A. 6th) 195 F. 913, 915, 916; Stewart v. Nebraska Tire & Rubber Co. (C. C. A. 8th) 39 F. (2d) 309, 311; Des Moines Elevator & Grain Co. v. Underwriters' Grain Asso. (C. C. A. 8th) 63 F. (2d) 103, 105."

On this point we would also refer this Court to the cases of:

> *Young* v. *So. Pac. Co.* (C. C. A. 2) 15 Fed. (2d) 280; *Jacobson* v. *Chicago, etc. Ry Co.* (C. C. A. 8), 66 Fed. (2d) 688; *Jackson* v. *Chicago, etc. Ry. Co.* (C. C. A. 8), 178 Fed. 432; *Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28 (Reversed on other grounds by Supreme Court); *Barney* v. *Latham*, 103 U. S. 205; 26

L. E. 514; *Geer* v. *Mathieson*, 190 U. S. 428; 47 L. E. 1122; *Connell* v. *Smiley*, 156 U. S. 335; 39 L. E. 443.

POINT V.

The Jurisdiction of a Federal Court is not Less Extensive Because a Suit is Instituted in That Court Than it Would be Were the Suit Commenced in the State Courts and Removed to the Federal Court.

Consequently, the Authorities Dealing with the Right of a Defendant to Removal from the State Courts are Equally Applicable to the Question of the Jurisdiction of a Federal Court in a Suit Commenced Therein.

The jurisdiction of the District Court in a case of this character, whether filed therein originally or removed thereto from a State court, is founded upon Judicial Code Section 24, as amended (28 U. S. C. A. 41 (1)), as follows:

> "The district courts shall have original jurisdiction as follows: 1 . . . . Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . . (b) Is between citizens of different states . . . .".

The right to remove a case from a State court to a Federal court is founded upon Judicial Code Section 28, as amended (28 U. S. C. A. 71), as follows:

> " . . . . Any other suit of a civil nature, at law or in equity, *of which the district courts of the United States are given jurisdiction* by this title, and which are now pending or which may hereafter be brought in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein being non-residents of that State. And when *in any suit mentioned in this section* there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district . . . ." (Italics ours.)

It follows from the above statutory provisions that authorities dealing with the jurisdiction of the district courts upon petitions to remove thereto from the State courts are equally applicable upon the question of the jurisdiction of those district courts in cases originally filed therein.

POINT VI.

Where a Complaint is Filed in a State Court Setting Forth a Separable Controversy, and is Removed to the District Court, That Court has Jurisdiction of the Entire Action. The Rule is the Same Where the Suit is Originally Filed in the District Court.

In removal suits it is thoroughly established that where the complaint contains a separable controversy, upon removal to the District Court, not merely that separable controversy but the entire suit is so removed to that District Court.

In *Barney* v. *Latham*, 103 U. S. 205, 26 L. E. 514, 518, the court says:

> "We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all of the defendants may not have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State court was erroneous."

In *Geer* v. *Mathieson*, 190 U. S. 428, 47 L. E. 1122, 1124, the court says:

> "A suit may, consistently with the rules of pleading, embrace several distinct controversies. . . . In other words, as expressed in *Fraser* v. *Jenneson*, 106 U. S. 194, 27 L. E. 132, 1 Sup. Ct. Rep. 171, 'a case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined

> without the presence of any of the other parties to the suit as it has been begun.' And, when two or more causes of action are united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which, if it had been sued on alone, would be removable."

See, also, *Connell* v. *Smiley*, 156 U. S. 355; 39 L. E. 443, 445.

In *Jacobson* v. *Chicago etc. R. Co.* (C. C. A. 8), 66 Fed. (2d) 688, in a negligence action, quoting from *Strother* v. *Union Pac. R. Co.* (D. C.) 220 Fed. 731, 733, the court says:

> " 'If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it.' "

In *Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28, the complaint was in two counts and, as in the present case, the second count adopted the allegations of the first count. The plaintiff was the administrator of the estate of the decedent. He was a resident of the State of Louisiana, of which State the defendants were also residents.

In the first count recovery was sought for damages sustained by the widow and children of the decedent by reason of his death. In the second count recovery was sought for the pain and suffering sustained by the deceased prior to his death. Under the laws of Oklahoma recovery on the first count would be solely for the benefit of the widow and children, though first passing into the estate of the decedent. Recovery upon the second count, however, would become general assets of the estate of the decedent.

The Circuit Court of Appeals held that the widow and children were the real parties in interest in the first count and that as they were residents of the State of Oklahoma,

diversity of citizenship existed between them and the defendant and that irrespective of the second count in the complaint the cause was removable from the State court to the District Court. In so holding the court says, p. 30:

> "Coming now to the second cause of action removed and pleaded in the petition, it may be said that cause of action could neither have been brought in the Federal court nor, standing alone, have been removed thereto for want of jurisdiction over the subject-matter in a federal court, for the jurisdictional amount in controversy was not claimed, and any recovery had would go into the estate for administration and distribution by the administratrix. However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts or causes of action, one of which controversies is removable into a federal court and the other not removable, a removal into a federal court of the causes of action which may be removed brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf. (Citing many authorities.)"

This Court granted certiorari in the above case and reversed the decision of the Circuit Court of Appeals, but did so on the ground that it was the residence of the plaintiff administrator, and not the residence of the widow and children, which controlled, and that, therefore, diversity of citizenship did not exist as to either count.

Assuming that we are correct in our contention that the complaint contains a "separable controversy", then had that complaint been filed in the State court and thereafter there had been filed a petition for removal to the District Court, that District Court would have had jurisdiction to determine the entire case, both the "separable controversy" and all other controversies contained therein. There can be no serious assertion that the rule is different where the cause is filed originally in the District Court.

We submit that the District Court had jurisdiction over each of the first and second causes of action in plaintiffs'

complaint because of the existence in each of a controversy solely between the resident plaintiff and the non-resident defendant, May Company, and that, therefore, the District Court necessarily had jurisdiction over the entire action.

POINT VII.

The Defendant Goddard Was Not an Indispensable Party in so far as the Controversy Between the Resident Plaintiff and the Non-Resident Defendant, May Company is Concerned. Therefore the District Court had Jurisdiction Over Said Controversy.

The very least that can be said with regard to the present case is that the defendant Jerry Goddard was not an indispensable party to the controversy between the resident minor plaintiff and the non-resident defendant, May Company, arising out of the maintenance, operation, supervision, and control of the instrumentality alleged to have been attractive to children.

Not being an indispensable party to such controversy, his joinder as a defendant cannot defeat the jurisdiction of the District Court over that controversy, and its judgment, at least in so far as that defendant is concerned, must be affirmed.

In *Cameron* v. *McRoberts*, 3 Wheat. 591, 4 L. E. 467, the plaintiff, a citizen of Kentucky, instituted a suit in the United States District Court of Kentucky. The defendant Cameron was a citizen of Virginia but certain of the other defendants were citizens of Kentucky. Cameron moved to dismiss the suit on the ground of lack of jurisdiction. Consequently, the question arose as to whether the District Court had jurisdiction of the case as to all defendants, or if not, whether it had jurisdiction as to the defendant Cameron alone. The question was certified to this Court and the following answer given:

> "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that sub-

stantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised to him alone."

In *Boon's Heirs* v. *Chiles*, 8 Pet. (U. S.) 532, 536, 8 L. E. 1034, 1036, the suit was instituted in the Federal District Court, praying that the defendant Chiles or such other of the defendants as may hold the legal title to certain property be decreed to convey it to the plaintiff, and for general relief. The court said:

> "We think, therefore, that the question between the plaintiffs and the defendant William Chiles is within the jurisdiction of the Circuit Court for the District of Kentucky, and may be decided by that court, though Hay's heirs were not parties to the suit. That they were made parties, cannot oust the jurisdiction as between those who are properly before the court."

Armstrong v. *New La Paz etc. Co.* (C. C. A. 9), 107 Fed. (2d) 453, involved a tort action against certain partners, one of whom was a resident of the same state as the plaintiff. In affirming jurisdiction of the District Court, it is said, page 454:

> "Appellants attack the jurisdiction of the District Court to entertain the action or to render any judgment contending that the action is against the copartnership, and that McDonald was therefore an indispensable party. If this were true it would follow that there would not be the diversity of citizenship necessary to confer jurisdiction on the federal courts. However, upon this point we deem it sufficient to say that the defendants herein are sued individually upon their joint and several liability for the alleged tort. That such joint and several liability exists in Arizona is clear from Revised Code of Arizona, 1928, Section 3836 and the case of Evans v. Colorado Sav. Bank, 41 Ariz. 504, 19 P. 2d 1062."

Likewise, under California law, the liability of an employer and an employee for personal injuries is joint and several and either employer or employee may be sued sepa-

rately. *Rogers* v. *Ponet*, 21 Cal. App. 577, 581; 132 Pac. 851, 853; *Gosliner* v. *Briones*, 187 Cal. 557, 563; 204 Pac. 19, 22.

In *Hirsch* v. *Stone* (C. C. A. 5), 62 Fed. (2d) 120, 122 (Certiorari denied, 289 U. S. 747, 77 L. E. 1493), the suit was instituted in the United States District Court. On the question of jurisdiction the court says, page 122:

> "Jurisdiction is not defeated by the joinder or failure to join formal or unnecessary parties."

Blytheville etc. Co. v. *St. Louis-San Francisco Ry. Co.*, (C. C. A. 8), 33 Fed. (2d) 481, also involved a suit commenced in the United States District Court. In connection with the question of jurisdiction, the court says, page 483:

> "The Supreme Court of the United States in *Wormley* v. *Wormley*, 8 Wheat. 421, 451 (5 L. E. 651), has laid down the following rule:
>
> 'This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others.'"

It is interesting to note that in both of the last cited cases, though the actions were commenced in the Federal District Courts, nevertheless, on the question of jurisdiction the courts cite "removal cases", amongst which is the case of *Salem Trust Co.* v. *Mfrs. Finance Co.*, 264 U. S. 182, 189, 68 L. E. 628, 631, wherein the court says:

> "The district courts have original jurisdiction of controversies between citizens of different states (Const. art. 3 § 2; Judicial Code, § 24); and when, in any suit brought in a state court, there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, a defendant interested in such controversy may remove the suit to the proper district court of the United States. Judicial Code, § 28. District courts have jurisdiction if all the parties on the one side are of citizenship diverse to

those on the other side. Jurisdiction cannot be defeated by joining formal or unnecessary parties. The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed (Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518; Ex parte Nebraska, 209 U. S. 436,444, 52 L. ed. 876, 879, 28 Sup. Ct. Rep. 581), and is not affected by the fact that one of the defendants is a citizen of the same state as the plaintiff, if that defendant is not an indispensable party to the controversy between plaintiff and defendant, who are citizens of different states (Barney v. Latham, supra, 213)."

Weiland v. *Pioneer Irrigation Co.* (C. C. A. 8), 238 Fed. 519 (affirmed, 259 U. S. 498, 66 L. E. 1027), again involved a suit instituted in the Federal District Court. On the question of jurisdiction the court says, page 522:

"At the trial the defendants offered to prove that the owner of the Carroll and Gilmore ditch, at the time of the commencement of the action were, and ever since had been, citizens of the State of Nebraska, the same state as that of the plaintiff. Counsel for plaintiff admitted that such was the fact. The court ruled that, conceding the facts to be as stated it did not oust the court of jurisdiction. We do not think there was error in this ruling, as the defendants brought into the court by order of the court were not indispensable parties, without whom no decree could be rendered."

In the present case the District Court had jurisdiction of the controversy between the resident minor plaintiff and the non-resident defendant, May Company, arising out of the maintenance and operation by the latter of the escalator alleged to have been attractive to that plaintiff. Consequently, the Circuit Court of Appeals was in error in ordering the dismissal of the case as to that non-resident defendant, and we submit that under the rule laid down in "removal cases" the District Court had jurisdiction of the present action in its entirety.

POINT VIII.

Upon the Dismissal of the Case as to the Resident Defendant Goddard, the District Court had Jurisdiction to Render a Judgment as to the Non-Resident Defendant, May Company.

The case of *Western Union Telegraph Co.* v. *Nester* (C. C. A. 9) 106 Fed. (2d) 587, was instituted in the District Court for the Southern District of California. The facts of the case were much less favorable to Federal jurisdiction than are the facts of the case at bar. Therein the complaint consisted *of but a single count* alleging negligence against both the resident defendant, Inie, and the non-resident defendant, Western Union. The District Court found that the resident defendant was either grossly negligent or grossly incompetent (25 Fed. Supp. 478, 480). In other words, the District Court found that there was a just claim against the resident individual and the non-resident Western Union because of negligence on the part of the resident employee, but that the plaintiff had failed to establish any injury arising therefrom. It therefore dismissed the case against the resident defendant Inie, and rendered judgment on its statutory liability against the non-resident defendant Western Union.

In the present case, the evidence did not go as far as in the *Nester* case, in that it failed to establish any negligence on the part of the resident defendant Goddard; in fact the plaintiffs did not even attempt to introduce any evidence of negligence upon his part. No attempt was made to show that Goddard had any control over the escalator or that in reversing the same he did anything that a normally prudent person would not have done.

If the dismissal of the action by the court in the *Nester* case as to the resident Inie, against whom negligence was established, nevertheless conferred jurisdiction to render a judgment as to the non-resident Western Union, certainly a similar dismissal as to the resident Goddard in the present case, against whom no negligence whatsoever was estab-

lished, likewise confers jurisdiction on the court to render judgment as to the non-resident May Company.

It is true that in the *Nester* case no appeal was taken from the judgment in favor of the resident defendant Inie, but we submit that the jurisdiction of the District Court to render a judgment between the plaintiff and the non-resident defendant Western Union could not depend upon future action to be taken or omitted by the plaintiff. At the time it rendered its judgment the court either had jurisdiction or it did not have it, and an appeal or a failure to appeal from another part of that same judgment could not operate to confer or oust such jurisdiction.

Moreover, while the notice of appeal may have been sufficiently broad to have constituted an appeal from the judgment in favor of the resident defendant Goddard, nevertheless, as we have previously pointed out in this brief, no attempt was made in the briefs or upon oral argument to advance any reason why the judgment dismissing the action as to that non-resident defendant Goddard should not, upon the merits, be affirmed. The failure to advance any such argument constitutes an abandonment of the appeal. Consequently, the status of the case at bar before the Circuit Court of Appeals was, in fact, exactly the same as that of the status of the *Nester* case.

Though the Supreme Court reversed the decision of the Circuit Court of Appeals in the *Nester* case (*Western Union Telegraph Co.* v. *Nester*, 309 U. S. 582; 84 L. E. 960), it did so upon other grounds. While the court does not discuss the jurisdictional point, and we understand that it was not raised by the parties, nevertheless the form of reversal necessarily assumes the jurisdiction of the District Court. Thus, in remanding the case, the Supreme Court says (p. 964, 84 L. E.):

> "The challenged judgment must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

In fact the *Nester* case is but another example of the rules laid down by the Supreme Court from its earliest times and uniformly followed ever since.

In *Horn* v. *Lockhart*, 17 Wall. 579, 21 L. E. 657, the plaintiff brought a suit in the federal courts against an executor attacking the probate of the will, the accounts of the executor, and charging him with malfeasance in his administration of the estate. The complaint joined all parties interested in the estate, including McPhail and wife, who were residents of the same state as plaintiff. The McPhails defaulted and a decree *pro confesso* was entered against them. Subsequently the defendant executor made a motion to dismiss based on lack of jurisdiction because of the residence of the McPhails. The court took this motion under submission and ordered the case to proceed, which it did. The court rendered judgment by which the probate of the will was sustained, the executor was charged with certain items, and the complaint was dismissed as to the McPhails. In upholding the jurisdiction of the court and affirming the judgment, the court says, page 660:

> "The objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same State with the complainants, was met and obviated by the dismissal of the suit as to them. They were not indispensable parties; that is, their interests were not so interwoven and bound up with those of the complainants, or other parties, that no decree could be made without necessarily affecting them."

In *Connolly* v. *Taylor*, 2 Pet. 556, 565, 7 L. Ed. 518, 521, the court says:

> "So in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the

exercise of that original jurisdiction which the court possessed between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course."

In *Vattier* v. *Hinde*, 7 Pet. 252, 261, 8 L. ed. 675, 679, the court says:

> "This certificate applies to the state of parties at the time of the decree, and affirms this principle. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them over whom the court has jurisdiction without affecting the interests of others, its jurisdiction may be exercised as to them.
>
> "*If, then, when this cause came on for hearing, Abraham Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him,* if such decree could have been pronounced as to them without affecting his interests.
>
> "We perceive no principle of reason or law which opposes this course. The incapacity of the court to exercise jurisdiction over Garrison could not affect their jurisdiction over other defendants whose interests were not connected with his, and from whom he was separated by dismissing the bill as to him." (Italics ours.)

See also:

Jennings v. *United States* (C. C. A. 8), 264 Fed. 399; *Hicklin* v. *Marco* (C. C. A. 9), 56 Fed. 549; *Sioux City* v. *Trust Co.* (C. C. A. 8), 82 Fed. 124; *Smith* v. *Consumer's etc.* (C. C. A. 5), 86 Fed. 359; *Tug River* v. *Brigel* (C. C. A. 6), 86 Fed. 818; *Westfeldt* v. *N. C. Mining Co.* (C. C. A. 4), 166 Fed. 706; *Jackson* v. *Jackson* (C. C. A. 4), 175 Fed. 710; *Silver King* v. *Silver King* (C. C. A. 8), 204 Fed. 166; *Thomas* v. *Anderson* (C. C. A. 8), 223 Fed. 41; *Galveston* v. *Foster* (C. C. A. 5), 284 Fed. 932; *Drumright* v. *Texas etc.* (C. C. A. 5), 16 Fed. (2d) 657.

It is, therefore, respectfully submitted that the District Court had jurisdiction to render its judgment:

(1) Because the complaint stated separable and separate causes of action against the non-resident defendant, May Company, based upon the alleged maintenance by it of an instrumentality attractive to children, in which cause of action the resident defendant, Goddard, was not even a proper party;

(2) Because the defendant, Goddard, was not an indispensable party to the controversies between the resident minor plaintiff and the non-resident defendant, May Company, and

(3) Because of the attaching of jurisdiction as to the defendant, May Company upon the dismissal of the case as to the defendant Goddard.

POINT IX.

Had the Circuit Court Considered the Case on its Merits the Judgment of the District Court Would Have Been Affirmed.

This point is urged upon the authority of *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 75 L. E. 544, which holds that on writ of certiorari to review a judgment of a Circuit Court of Appeals the entire record is before this court, with power to review the action of the Circuit Court of Appeals and direct such disposition as that court might have made of it upon the appeal from the District Court.

As regards the defendant Goddard, there is a complete absence of any evidence in any wise tending to show negligence upon his part. There is no evidence that what he did was not, in fact, the best and wisest thing to have been done. There is no evidence that any negligent action upon his part contributed to any injury sustained by the minor plaintiff.

As regards the defendant May Company, there is likewise no evidence of any negligence upon its part in the construction, operation, supervision or control of the escala-

tor, and the authorities cited by the District Court in its opinion clearly establish that the plaintiffs were not entitled to a judgment under either the doctrines of attractive nuisance or *res ipsa loquitur*.

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals for the Ninth Circuit herein should be reviewed by this Court for the reasons, as hereinabove shown, that said judgment is in conflict with decisions of other Circuit Courts of Appeals, is probably in conflict with decisions of this Court, and decides an important question of Federal law of wide application and general interest patently incorrectly and that, therefore, writ of certiorari should be granted in order that this Court may review said decision of the Circuit Court of Appeals herein and finally reverse same.

WALTER O. SCHELL,
GERALD F. H. DELAMER,
JOSEPH H. WHEELER,
Counsel for Petitioners.

FRANK J. HOGAN,
EDMUND L. JONES,
Of Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1940

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MAY DEPARTMENT STORES COMPANY, a New York Corporation, and JERRY GODDORD,

Petitioners,

vs.

TAKASHI KATAOKA, by his Guardian *ad Litem*, TSUTOMU KATAOKA, and TSUTOMU KATAOKA,

Respondents.

Brief of Respondents in Answer to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

J. Marion Wright
ALBERT E. COGER,
230 H. W. Hellman Building, Los Angeles,
Attorney for Respondents.

Parker & Baird Company, Law Printers, Los Angeles.

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Respondents.

Brief of Respondents in Answer to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your respondents are convinced that a review of this case would only result in affirmance and in delay and expense though if the jurisdictional defect were such that it could be so cured that a consideration of the merits might be had in this Court, justice would be served.

Throughout, unless otherwise indicated, italics are ours.

The Matter Involved.

The complaint comprises two related matters, stated in three counts. The first two counts seek the same recovery for the same injury from the same defendants, resulting from the identical situation and facts.

Paragraph XIII of the *first* count is as follows:

"XIII.

"That by reason of the negligence and carelessness of the defendants and *each of them*, as aforesaid, and as a proximate consequence thereof, the said plaintiff minor not only lost the two fingers as aforesaid, but has completely and permanently lost the normal use and function of said right hand; has suffered excruciating pain, received a profound shock to his nervous system, and his capacity for labor and for the enjoyment of life will be seriously and permanently impaired, all to his damage in the sum of Fifteen Thousand and No/100 ($15,000.00) Dollars. (5)"

Paragraph III of the *second* count is as follows:

"III.

"That by reason of the negligence of the defendants, and *each of them*, and as a proximate consequence thereof, the said plaintiff minor not only lost the two fingers as aforesaid, but has completely and permanently lost the normal use and function of said right hand; and has been left with a permanent deformity; has suffered excruciating pain, received a profound shock to his nervous system, and his capacity for labor and for the enjoyment of life will be seriously and permanently impaired, all to his damage in the sum of Fifteen Thousand and No/100 ($15,000.00) Dollars."

In the third cause of action, the father of the child seeks to recover for medical expenses.

It should be observed that in paragraph V of the first cause of action, which is also incorporated in the second cause of action, it is alleged:

"V.

"That *at all times* herein mentioned the defendant Jerry Goddord was the duly appointed, qualified and acting agent, servant and employee of the defendant, The May Department Stores Company, a corporation, and *as such was acting within the scope* of his employment for said corporation."

In the petition it is stated that the answer *admitted* by failure to deny that the defendant Jerry Goddord was its employee, "acting within the scope and course of his employment." (Petition, p. 5, center.)

The complaint charges that the defendant Jerry Goddord, the servant of the defendant May Company (acting "within the scope of his employment for said corporation" —the defendant May Company), after the child's hand was caught in the escalator, attempted to remove the hand by pulling on it, but to no avail, and finally stopped the escalator, which action likewise failed to release the hand —whereupon the defendant Jerry Goddord threw the escalator into reverse, and as he did so the escalator clipped off the third and fourth fingers of the child's right hand; and the complaint further alleges that Mr. Goddord did not summon anyone having knowledge of the mechanics of said escalator to aid in removing the child's hand. In paragraph XIII, the complaint alleges that the loss of the fingers was due to the "negligence and carelessness of the defendants, and *each of them.*"

The first cause of action is not predicated on the mere fact that the store was equipped with an escalator; but, upon the *failure to exercise the care* in its use which the nature of the machine, its potentialities of disaster to little children required in a situation which included among other negligences the failure to provide an attendant to guard little children normally present in large numbers in the children's clothing department of a large store.

In the second cause of action there is included the allegations we have above stated, and also:

"II.

"That the loss of said plaintiff minor's fingers was due to the carelessness and negligence of the defendants and each of them in maintaining, operating, conducting and supervising the said escalator, and to the carelessness and negligence of defendants' agent and servant, Jerry Goddord, in attempting to remove the said minor's hand after it had been inserted into said aperture, and by failing to summon an expert who had working knowledge of the said escalator to release the said hand."

Notwithstanding these allegations and that admission of the answer that Mr. Goddord was acting within the scope of his employment, petitioners state:

"There is, however, still no allegation that the defendant Goddord had any participation in or control of the operation, conducting or supervising of the escalator."

While it appears to us jurisdiction depends upon the complaint (and not upon a fragment of it), in the absence

of a showing of fraud in joining a stranger to the issue for the purpose of defeating the right of the real defendant to a trial of the issue in the United States courts, because authorities as to fraud cited in the petition, it should be said that the record shows that Mr. Goddord was the "floor man" [R. p. 58]: that he took sole charge of the situation when the child's hand was caught—went for the key, with it stopped the escalator: that there was no other employee of the store present when he so took charge—or that afterwards any other acted [R. p. 60]; that some sales people came later but took no part in the operation of the escalator; that before Mr. Goddord reversed the escalator he was unable to free the hand by pulling upon it [R. p. 52]; that no blood was showing before the reversal [R. p. 61]; that after stopping the machine he again tried to free the hand by pulling on it, but after the reversal the hand came freely away [R. p. 66] with the blood "shooting out" from the severed fingers. [R. p. 51.]

Both the first and second causes of action are based upon the failure of by the defendants to *exercise the degree of care* that the situation required. It is respondent's position that the *management, supervision, operation and control* of an escalator requires the same high degree of care as in the case of an elevator as towards adults—and, as to children, particularly in a situation such as here disclosed, the degree of care required of those controlling, supervising, stopping and starting an escalator, in the course of their employment, and those employing them is even higher; as greater precautions against the injury of children are required in a children's clothing department than in other sections of the store not so frequented by children.

Fundamentally it is the petitioner's position, as we understand it, that the first cause of action is predicated upon the mere existence in the store of an escalator, and as only the owner provided the machine he only may be sued and that the owner's liability is to be tested by the elements required in order to permit a recovery under the doctrine of attractive nuisance. Petitioners in their brief asserted that it must be shown that child was a *trespasser;* that the instrumentality was artificial and uncommon, that the child was *attracted to the premises* by childish curiosity and desire to play with *the machine.* These elements of the attractive nuisance doctrine, including holding that the child must be attracted to the premises by the instrumentality, are referred to in the opinion of the trial court.

If, after the close of business, the store had been left open and the child had been attracted to the third floor of the store by the dead escalator, and had been injured by that stilled escalator, in the absence of Mr. Goddord, the authorities relied upon by petitioners would be in point, for then only the owner of the escalator could be charged. However, it is obvious that if the escalator were not in motion, it would not be any more dangerous than any other stairway, and the mechanics of attraction we could not explain.

In the plaintiff's complaint, the fact that a moving stairway (so different from stationary stairs to which children are accustomed in their own homes—as Judge Denman observed on the oral argument herein), is attractive to children, is alluded to, not for the purpose *of basing recovery on the doctrine of attractive nuisance as it is defined and limited in the books,* but because that attractive-

ness, *only existing when the machine is in motion,* was an element bearing upon the degree of care required to protect children.

Plaintiff's injuries were not the result of a trespass induced by the attraction of an unattended dead escalator, but did come, we assert, from lack of care in the control, management and supervision of the *escalator in motion* in the children's clothing department of a store; and this suit is brought against the owner of the escalator, who is also the employer of the "floor man," the man solely in charge, who, acting in the course of his employment, took charge of the escalator and was the sole human actor at the time the child's fingers were destroyed.

Under the California law the liability for tort is joint and several. The plaintiff chose to charge both employer and employee. It is said that more emphasis has been placed upon the negligence of the May Company. Obviously failure to charge Mr. Goddord might be seized upon as an admission that no one was negligent. We rather think it would be.

As has been suggested, though there are counts in the complaint, the first two relate to the identical injuries and seek the same damages. This is not a suit for $15,000.00 on the first count plus $15,000.00 on the second.

The sufficiency of the pleadings is a matter of California law. It is well established that negligence may be alleged in general terms.

Roberts v. Griffith Co. (1929), 100 Cal. App. 456, 280 Pac. 199.

The effect of this rule is to make admissible in evidence any and all testimony which would tend to prove the allegation of negligence.

Carnahan v. Motor Transit Co., 65 Cal. App. 408 (288 Pac. 145).

"It is settled we think beyond question in this State that the doctrine of *res ipsa loquitur* applies when negligence is pleaded both generally and specially."

McComas v. Al. G. Barnes Shows Company, 215 Cal. 685, 12 Pac. (2d) 685.

In alleging negligence under the California law, it is not necessary to allege the conclusion of law that the defendants or either of them owed a duty to the plaintiff. It is proper to allege the facts out of which the duty arises. The defendant Goddord assumed, in the course and within the scope of his employment, the sole management, control and operation of the escalator, and it was not necessary to allege that he and his employer owed to the plaintiff the duty to exercise care or to define the degree of care in its operation by him. The law imposes the duty.

Obviously, we repeat, petitioner is in error in identifying the action as based on the theory of attractive "nuisance." An escalator is not dangerous when it is not in motion. Still, it is a stairway like other stairways, less dangerous, as it is narrow and it's protecting walls have hand railings.

In action, it is attractive and dangerous, as the maimed hand of the child demonstrates and when it is in use—though in a children's clothing section of a metropolitan department store—care adequate to the situation must be taken.

Under the California law, the degree of care is for the jury, even if there be no conflict in the evidence:

In *Malone v. Clemow*, 111 Cal. App. 13 (295 Pac. 70), it is said:

> "Generally speaking, the degree of care required under any given circumstances is a question of fact for the court or jury, and is not a question of law. *This is true even where there is no conflict in the evidence, if different conclusions upon the subject can rationally be drawn therefrom. If the conceded facts are such that reasonable minds might differ on the question as to whether or not one was negligent, the question is one of fact for the jury, or the court sitting without a jury. These rules are so well established as to render citation of authority unnecessary.*"

The substance of the foregoing excerpt was repeated with approval in *Goodwin v. Goodwin*, 5 Cal. App. (2d) 644-646 (43 Pac. (2d) 332).

The petitioner's theory that the first count does not state a cause of action against the May Company, is not referred to in the petition.

The plaintiff's case and the child has but one case: he asks for $15,000.00—no more. The same injuries, the same defendants are named in both counts, and both counts are based on the fact that he was injured by a moving machine, and the storekeeper and its servant who

handled the machine and set it in motion when it destroyed his fingers were guilty of negligence—joint and concurrent.

The text of Corpus Juris, Vol. 45, p. 771:

> "Where *no trespass* is involved, the attractive nuisance doctrine is not applicable, but the right to recover for injury is based on *different principles.*"

Without the attractive nuisance theory (aside from the fact that the second count is for the same injury, for the same and not additional damages, against the same defendants—and the California rule that if one count is erroneously stricken, it is error without prejudice; if under the remainder of the complaint, full proof may be made), the whole argument of the petition falls.

The matter presented under Point 3 of the petition makes relevant the law of California as to proof.

Briefly the position of respondent at the trial, and now, is that the plaintiff made a *prima facie* case which required an explanation from the defendants—and if the explanation had been made, the inferences as to care and negligence were for the jury.

The doctrine of *res ipsa loquitur* applied to the situation and was available under the pleading.

These facts do appear. A four-year-old boy went with his mother to the children's clothing department of the May Company, the mother having business with the store in exchanging a suit for another child. The little boy

went in with five fingers; he came out with two largely destroyed, and those fingers were destroyed by an escalator owned and operated by the May Company.

Such an incident calls for an explanation by the owner of the machine. It is true that the burden of proof rests on the plaintiff to establish negligence of the defendants, but in the absence of an explanation, an *inference arises that* the defendants were negligent.

In *May Department Stores v. Bell*, 61 Fed. (2d) 830, at page 834, the court say (italics ours):

> "Perhaps the most quoted, simplest and best statement of the law with reference to the application of the maxim, *'res ipsa loquitur'* is that of Chief Justice Erle in Scott v. The London & St. Katherine Docks Co., 3 Hurlst & C. 596, 159 Eng. Reprint 665. The accident out of which the case arose was the falling of six bags of sugar from the defendant's warehouse upon the plaintiff. In holding the question of negligence was for the jury, the court said (page 601 of 3 Hurlst & C.): 'There must be reasonable evidence of negligence. *But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the* accident arose from want of care.'"

The Rule is stated at 20 *R. C. L.*, p. 156, in the following language:

> "More precisely the doctrine of *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is

such as in the ordinary course of events does not happen if due care is exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery *in the absence of any explanation* by the defendant tending to show that the injury was not due to his want of care."

In the instant case, there was no explanation by the defendants. The motion for a nonsuit was a declination to explain. Note the difference in the last cited case; 61 Fed. at page 833:

> "The *chief engineer* of the Famous & Barr Company testified that there were in the store ten escalators under his supervision; that these escalators were purchased from the largest manufacturer in the country; that there was an inspection of the escalator at different times each day, one in the morning about the time the store opened, again in the afternoon toward the close: that *his foreman* makes an inspection throughout the day, and that in going to and from the floors they ride the escalators and see if they are in running condition; that if they find anything wrong with any escalator, it is immediately shut down and taken out of service; that *at the head of each escalator there is some one to watch its operation and the passengers; that at the time of the accident there was some one in attendance;*" . . . etc.

In the above cited case the doctrine of *res ipsa loquitur* was applied.

Cookson v. Fitch, 116 Cal. App. 544 (3 Pac. (2d) 27);

Vertson v. Los Angeles, 116 Cal. App. 114 (2 Pac. (2d) 627);

Ellis v. Jewett, 18 Cal. App. (2d) 629, 64 Pac. (2d) 432.

Authorities Cited by Petitioner.

We have examined with interest authorities cited by the plaintiff, and would call attention to certain features of some of them which make them inapplicable to this case. With the theory that it ought to be the law that if a separable controversy is removed the entire case should be removed; and, that the same rule should be applied to actions originally commenced in the federal court as to those in the state court, we have no quarrel.

We think that petitioner has failed to recognize the distinction that exists between tort cases, in which the plaintiff has the right to determine who is an indispensable party, by suing the tort feasors jointly or separately, and actions in which the right of election does not exist. Further, we think petitioner confuses separate controversies with separate defenses; and, ignores the rule that where there are separate concurrent negligences which may arise to separate defenses, the plaintiff has nevertheless the right to sue jointly the several concurrent tort feasors, and may not be deprived of that right by the defendants.

In the discussion of the *Nester* case, we shall have occasion to refer to the good faith of the plaintiffs in joining Mr. Goddord.

Wecker v. National Enameling & Stamping Co.,
204 U. S. 176, 51 L. Ed. 430.

If the base of the decision were the facts stated by petitioner, there would have been no removal. The removal was ordered because it was proved that the resident defendants were merely draftsmen employed in the office of the company—and the allegations of the complaint connecting them, were false and were *fraudulently* made for the purpose of preventing removal.

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. Ed. 144, is also a case of fraudulent joinder; and the court held that the fact that a joinder of a resident defendant, fair on its face, is a *fraudulent device* to prevent removal may be shown by extrinsic proof. It was shown.

Clancy v. Brown, 71 Fed. (2d) 210, is also a case of fraudulent joinder; and the court held that the joinder of the resident was *not in good faith*, and the court may go behind the pleadings and if the joinder is a fraudulent device will order removal.

Knight v. Atlantic Coast Line R. Co., 73 Fed. 76. The resident defendant who was joined did not *have any connection* with the incident out of which the damage arose. Clearly he was not a necessary or a proper party, and his joinder was disregarded. The defendant Goddord was the person who, in the course of his employment, was in charge of and personally operated the escalator when the accident occurred. He was charged with the duty of ex-exercising in its operation and its management the degree of care toward the child which the situation required. That was the highest degree of care, and the operator—and the word, though singular, here *includes both defendants*—are responsible for the *"slightest neglect that human care and foresight might have guarded."*

> *Parker v. Manchester Hotel Co.*, 29 Cal. App. (2d) 446, 454, 85 Pac. (2d) 152, 157;
>
> *City of Winfield v. Wichita Natural Gas Co., et al.*, 267 Fed. 47.

The court found that there were separate and distinct causes of action, the determination of neither of which is essential to the determination of the other. In determin-

ing separability in tort cases and the identity of indispensable parties, the rule as to concurrent negligence of master and servant and the right of the plaintiff to elect whether he will sue one or both should be kept in mind.

Macutes v. Cudahy Packing Co., 203 Fed. 291.

In this case there was no allegation of facts showing connection of the resident defendant with event. Mr. Goddord is charged with *misfeasance*, not nonfeasance. It is not necessary to go into liability of an agent for nonfeasance or misfeasance. Failure to take proper care in operating a machine is misfeasance. Goddord was in charge personally and upon him rested the duty of vigilance to see that the child was not hurt. (*Camlon v. Marty*, 98 Cal. App. 598, 277 Pac. 365; *Bush v. Southern Pac. Co.*, 106 Cal. App. 101, 289 Pac. 190; *Gorzeman v. Artz*, 13 Cal. App. (2d) 660, 57 Pac. (2d) 550.)

In Mechem, Agency, 2nd Ed. page 1082, it is said:

> "In actual practice, the liability of the agent or servant is usually ignored, because it is more convenient or effective to pursue the master, but the servant's liability nevertheless exists . . . And so if a servant while driving his master's horse, operating his master's machine, or managing or conducting any other property of his principal over which he has control, so drives or manages as to inflict injury upon third persons under circumstances which would render him liable if he were doing the same thing on his own account, he will be personally liable. In such case the servant, or agent is the actor, and the fact that he is acting for a principal is only the occasion or opportunity for his act, not its justification."

Osborne v. Morgan, 130 Mass. 102;

Floyd v. Shenango Furnace Co. (C. C. Minn.), 186 Fed. 539.

In this case the holding was that the joinder was *fraudulent.*

Certainly the proscribed forms 9 and 10 of negligence under the present rules and the abolition of demurrers, exceptions to the insufficiency of the pleading, lend no support to the petitioner's theory that having "picked" an imaginary "flaw" in the complaint as to the statement of a ground of *concurrent negligence* to which there is a *separate defense,* there is a *separable controversy.*

Nichols v. Chesapeake & Ohio Ry. Co. (C. C. A. 6), 195 Fed. 913.

In this case there were two distinct causes of action: one against the railroad company and its engineer on the theory of joint liability, and the other against the railroad company *alone* for failure to comply with the safety appliance act.

Thomas Boon's Heirs v. William Chiles, et al., 8 Pet. (U. S.) 532, 8 L. Ed. 1034.

"George Boon's heirs were not necessary defendants. They can have no interest in the contest, nor is any decree asked against them"

Armstrong v. La Paz etc. Co. (C. C. A. 9), 107 Fed. (2d) 453.

There can be question as to the right of the plaintiff in a tort action to sue the tort feasors severally, and the defendant has no right to say that the suit must be joint, and it is equally well established that when the plaintiff

elects to sue them jointly the defendant has no right to insist that they shall be sued severally.

> *Western Union Telegraph Co. v. Nester,* 106 Fed. 587, 309 U. S. 582, 84 L. Ed. 960.

In the *Nester* case there was a dismissal in the District Court against the party the presence of whom ousted the federal court of jurisdiction, but not against the party defendant whose citizenship was diverse from that of plaintiff. The appellees in their brief in the Circuit Court of Appeals on the subject of jurisdiction stated that the defendant "Ivie *had been erroneously joined in the suit and that the plaintiff had no intention whatever of securing a judgment against the defendant Ivie, she being merely a formal and dispensable party. She was not a necessary party and had no interest in the litigation other than as a witness.*" (This is a quotation from appellees' response to the Circuit Court's questionnaire on jurisdiction.)

Neither of the parties questioned the action of the court in dismissing against the defendant Ivie. The plaintiff did not appeal from the judgment of dismissal against Ivie.

There was no violation of the rule stated by Justice Gray, quoted in *Alabama G. S. R. Co. v. Thompson,* 200 U. S. 206, 50 L. Ed. 446, 4 Ann. Cas. 1147—at pages 214-215, states the rule clearly:

> "It is well settled that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all of them jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they

> file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, *'a defendant has no right to say an action shall be several which the plaintiff seeks to make joint.* A separate defense may defeat a joint recovery, but it *cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way.'* The cause of action is the subject matter of the controversy, and *that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings."*

As the situation was when the question of jurisdiction was presented to the Circuit Court, the action of the court and the acquiescence therein by the plaintiffs, and the response by plaintiffs to the court's questionnaire above stated, were, we suggest, considered the equivalent of a dismissal by the plaintiffs on their own motion of the suit in the District Court against a joint and several tort feasor.

It may be observed that the attorneys who instituted this suit were the attorneys for the plaintiffs in the *Nester* case. There can be no question of their good faith. They certainly did not join Mr. Goddord for the purpose of preventing a removal to the federal court. *They filed this suit in the federal court.* In the *Nester* case, the Circuit Court of Appeals questioned, at its own instance, the jurisdiction and issued the questionnaire to counsel. At the time that was done the instant case had been tried. Everyone had carried on in good faith. The question having been raised in the *Nester* case, it became apparent to counsel that there was jurisdictional defect in this case; and

at the suggestion of counsel who had brought this suit, a motion *to quash all proceedings* that had been had and for dismissal was made.

Pullman Co. v. Jenkins, 305 U. S. 534, 83 L. Ed. 334.

This case is one of the two principal authorities upon which the Circuit Court based its decision herein. Petitioner tries to distinguish it, but we submit it fully sustains the Circuit Court.

This case states clearly the rule applicable to the present situation, at p. 538:

> "This rule is applied where a non-resident employer and its resident employee whose negligence caused the injury are sued jointly;" . . .

citing, in addition to authorities elsewhere referred to herein: *Chesapeake & O. R. Co. v. Dixon,* 179 U. S. 131, 139, 45 L. Ed. 121, 125; *Chicago, R. I. & P. R. Co. v. Dowell,* 229 U. S. 102, 111-113, 57 L. Ed. 1090, 1095, 1096.

Wilson v. Chevrolet Motor Co. (C. C. A. 8th), 68 Fed. (2d) 686, 689;

Harrelson v. Missouri P. Transp. Co. (C. C. A. 8th), 87 Fed. (2d) 176, 177.

And, at p. 547:

> "It is immaterial that the liability of the master and that of the servant *proceed on different grounds. Even more distinct were the bases of liability* of the lessor and lessee railroad companies in Chicago, B. & Q. R. Co. v. Williard (220 U. S. 413, 55 L. E. 521; 31 S. Ct. 460), where the lessor was held on its obligation to the public, of which it could not be relieved by virtue of a lease."

The Test of Separable Controversy.

A case in some respects similar to this is *Hay v. May Department Stores Co.*, 271 U. S. 318, 70 L. Ed. 965.

In this case the theory was presented that where in a suit for personal injuries against two defendants each is charged with *separate and distinct acts of negligence* some of which affect only the nonresident defendant and others only the resident defendant, no joint cause of action is presented, and a separable controversy is presented. In support of that proposition, the counsel for appellant cited a number of federal cases (319), *all of which* are referred to in respondent's petition.

At p. 321, the court say:

> "It is well settled by the decisions of this Court, that an action brought in the State court against two defendants jointly, in which the plaintiff states a joint liability arising out of *concurrent negligence* of the defendants, does not present a separable controversy authorizing the removal of the case to the Federal court, even if the plaintiff might have sued the defendants separately, the allegations of the complaint being decisive of the nature of the controversy in the absence of a showing that one of the defendants was fraudulently joined for the purpose of preventing the removal."

In the case of *Venner v. Southern Pac. Co.*, 279 Fed. 832, there is a definition of separable controversy and a discussion of the case of *Greer v. Matheson*, cited by petitioner and attention was directed to the rule in suits against joint tort feasors.

At page 838, the court say:

"It is said by counsel that the Greer case has not been followed by the Supreme Court in later cases in that Court. It is pointed out that in Cincinnati, New Orleans & Texas Ry. Co. v. Bohon, Admr., *supra*, Mr. Justice Day said:

" 'A separable controversy must be shown upon the face of the * * * declaration, and * * * defendant has no right to say that an action shall be separable which the plaintiff elects to make joint.'

"But that was an action against joint tort feasors, where the plaintiff had the right to sue both defendants jointly, and in that class of cases there is, of course, no right of removal."

Southern Ry. v. Miller, 217 U. S. 209, 54 L. Ed. 732;

Alabama & Great Southern Ry. Co. v. Thompson, 200 U. S. 206;

Fraser v. Jernson, 106 U. S. 191, 27 L. Ed. 131;

Rose, Federal Jurisdiction & Procedure, Sec. 396.

In *St. Louis Ry. Co. v. McBride*, 141 U. S. 127, it is said:

"Whether on the facts stated in the complaint the plaintiff had a cause of action against the defendant were questions entering into the merits of the controversy, and not matters affecting the jurisdiction of the court."

We also refer to:

City of Bellaire v. Baltimore & Ohio Ry. Co., 146 U. S. 117, 36 L. Ed. 910;

Torrence v. Shedd, 144 U. S. 527, 36 L. Ed. 528; in which case, at p. 530, the court say:

"But in order to justify removal, upon the ground of a separate controversy between citizens of different States, there must by the very terms of the statute be a controversy 'which can be fully determined between them,' and by the settled construction of this section, the *whole subject matter* of the suit must be capable of being *finally determined* between them and complete relief afforded, without the presence of others originally made parties to the suit."

We paraphrase from *Tolbert v. Jackson*, 99 Fed. (2d) 513:

The statute deals specially with a controversy which is wholly between citizens of different states and which can be fully determined between them. 28 U. S. C. A. Sec. 71. The implication is that there must be another controversy in the same suit which otherwise would not be removable. . . . In this case there is but one claim, one ground of suit, one reason for process, one occasion for damages: the loss of the child's fingers. So far as respondent is concerned, there is one action based on the violation of a single right. The resident defendant has a complete common ground of defense with the nonresident defendant. There is no controversy between citizens of different states that can be fully determined between them. No cause of action arose until the accident happened. All elements and amounts claimed are common to both defendants and unite the controversy into a joint cause of action

at the option of the plaintiff. If separate suits were filed, there could be but one recovery awarding full damages, and a partial recovery would have to be credited on any subsequent suit for damages. What the respondent wants is not partial relief but full compensation, and the remedy she seeks requires the presence of both tort feasors.

Perhaps there is no more succinct statement of the test as to separable controversy than is found in *Chicago, Rock Island & Pac. Ry. v. Schwyhart* (227 U. S. 184, 57 L. Ed. 473), at page 194:

> *"On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was colorable ground for it when the removal was denied. We are not to decide whether a flaw could be picked in the declaration on special demurrer."*

We think it clear to the point of demonstration that this case does not contain a separate controversy of which the federal court has jurisdiction, plaintiff having elected to sue the master and the servant jointly.

Conclusion.

In *Olson v. Jacklowitz*, 74 Fed. (2d) 718, at p. 719, it is said:

> (2-4) "The suit as brought was not within the jurisdiction of the District Court. The only possible ground of such jurisdiction was diversity of citizenship, and the complaint itself showed that the plaintiff and one of the two defendants alleged to be joint tort-feasors were residents of the same State. That allegation,—and ever since Strawbridge *et al.* v. Curtis *et al.*, 3 Grand. 267, 2 L. Ed. 435, the law has been

too well settled on this point to leave the question of jurisdiction even debatable."

"Nor did the appellant acquire any rights by virtue of a so-called trial on the merits in a court which had no jurisdiction."

The Circuit Court referred in its opinion to the case of *Dollar S. S. Lines, Inc. et al. v. Merz,* 68 Fed. (2d) 594, in which the court held that diversity of citizenship must exist as to all parties where liability for tort is joint and several, and *not merely as to indispensable parties.* Attention is directed to the discussion concerning indispensable parties and the authorities cited. Petitioners in their brief seem to have overlooked this rule.

At page 594, the court say:

"Both parties, however, ask that if the defect in jurisdiction can be cured in this Court this should be done, and that the case be then disposed of on the merits."

In the *Dollar* case, the court concluded (p. 597) that it would be "unwise, if not improper, to consider the assigned errors."

We have, and so stated on argument in the Circuit Court of Appeals, have filed an action in the state court. It has remained inactive. It is not unlikely that before this litigation ends, a decision on the merits by an appellate tribunal will be sought. A ruling on the merits in this court would expedite justice.

We would welcome such a ruling and there was nothing which occurred during the argument before the judges of the Circuit Court of Appeals, upon which petitioners' expression of confidence of the affirmance of the decision of the District Court is based. If the case were sent down with directions as was done in the *Dollar* case, we would not exercise the option to dismiss in the District Court against the resident defendant.

As we are convinced that the only result of a review of the decision of the Circuit Court of Appeals would be an affirmance of its conclusion that no jurisdiction exists, we respectfully submit that the petition should be denied.

ALBERT E. COGER,
Attorney for Respondents.